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Message Text

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DEPT ALSO FOR NEA/ARP - ZIOLKOWSKI

E.O. 11652: N/A
TAGS: ENRG, KU
SUBJ: AMINOIL ARBITRATION

TO: KIEFER,
AMINOIL, NEW YORK TELEX 420908

FOLLOWING IS MESSAGE FROM AMINOIL VICE PRESIDENT ISON AND
WILLIAM OWEN ON ARBITRATION DISCUSSIONS WITH KUWAIT MINISTRY
OF OIL. BEGIN TEXT.

FOLLOWING IS SUMMARY OF MEETINGS IN KUWAIT APRIL 25 AND 26,
TOGETHER WITH BRIEF COMMENTS.

AAA. FIRST HAD DISCUSSIONS WITH AMBASSADOR MASESTRONE MORNING,
ARPIL 25, FOLLOWING WHICH WE HAD MEETING WITH MINISTER OF OIL
AND MOHSEN HAFEZ (VICE PRESIDENT OF DEPARTMENT OF LEGAL ADVICE
AND LEGISLATION). MINISTER OF OIL STRESSED HIS GOVERNMENT
WANTED A FAIR ARBITRATION, BUT FOR REASONS OF PRIDE AND
SOVEREIGNTY, 1948 CLAUSE WAS UNACCEPTABLE; THAT SINCE HE WAS
NOT A LAWYER, WE SHOULD MEET WITH HAFEZ TO "DRAFT" PRINCIPLES;
AND THAT WE WOULD BE ONLY A PHONE CALL AWAY IF WE NEEDED HIM.
WE STATED WE WERE SURPRISED AND IDSAPPOINTED WHEN GOVERNMENT
NATIONALIZED RATHER THAN SOUGHT ARBITRATION OF OUR DIFFERENCES;
THAT WE FELT WE HAD THEN NO OTHER COURSE THAN TO INITIATE
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ARBITRATION; THAT WE HAD ALWAYS HOPED FOR A BILATERAL
ARBITRATION; AND THAT, IN VIEW OF GOVERNMENT DESIRE FOR A FAIR
ARBITRATION, WE WERE HAPPY TO ATTEMPT IN GOOD FAITH TO FIND
A FAIR METHOD THAT WOULD BE MUTUALLY ACCEPTABLE ALONG THE LINES
THE MINISTER HAD SUGGESTED. THE MINISTER EMPHASIZED THAT THE
ARBITRATION ARRANGEMENTS MUST NOT IMPINGE ON KUWAIT'S NATIONAL
PRIDE AND SOVEREIGNTY.

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BBB. THE ABOVE WAS FOLLOWED BY AN AFTERNOON MEETING WITH HAFEZ AND ABDUL SAMIH (OF THE ECONOMIC AFFAIRS GROUP IN MINISTRY OF OIL.). WE SURMISE THE LATTER ATTENDED ON AN ASSUMPTION WE WOULD DISCUSS OUR CLAIMS (AS WE WERE ASKED TO DO), BUT SINCE WE DECLINED ON THE GROUND THAT SUCH WAS BEYOND THE SCOPE OF THESE MEETINGS, HE MERELY LISTENED AND TOOK NOTES.
THE AFTERNOON MEETING RESULTED IN THE FOLLOWING:
WE AGREED THAT THERE MUST BE AN ARBITRATION AGREEMENT WHICH WOULD COVER THE FOLLOWING:
(1) TWO ARBITRATORS, ONE APPOINTED BY EACH PARTY. HAFEZ VOLUNTEERED WE HAD ALREADY SELECTED OURS, AND THAT THE GOVERNMENT WOULD SELECT ITS PROMPTLY SO THAT THEIR NAMES WOULD APPEAR IN THE AGREEMENT. HE FIRST TOOK THE POSITION THAT THE PARTIES SHOULD AGREE ON THE THIRD ARBITRATOR. WE COUNTERED THAT IT WOULD BE MORE APPROPRIATE FOR THE TWO ARBITRATORS TO ATTEMPT TO AGREE ON THE THIRD. BOTH SIDES LEFT THIS POINT FOR LATER DISCUSSION. IN ANY CASE, WE AGREED THAT SOME INTER-NATIONALLY RECOGNIZED AUTHORITY AGREEABLE TO BOTH PARTIES SHOULD BE NAMED TO APPOINT THE THIRD ARBITRATOR IF AGREEMENT COULD NOT BE REACHED BY THE PARTIES OR THE ARBITRATORS. (COMMENT: WE EXPECT NO REAL DIFFICULTY ON THIS POINT; WE DID NOT SPECIFICALLY MENTION VACANCIES AFTER APPOINTMENT,SINCE THE TENOR OF THE CONVERSATION ASSUMED A SELF-EXECUTING AGREEMENT.).

(2) HAFEZ ACCEPTED OUR PROPOSAL THAT THE ARBITRATION MUST BE
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CONDUCTED IN A NEUTRAL, MUTUALLY CONVENIENT PLACE WITHOUT QUESTION, AND SUGGESTED GENEVA, LAUSANNE OR PARIS. WE SAID WE FELT THESE WERE SUGGESTIONS THAT SHOULD BE CONSIDERED, AND THAT WE MIGHT ALSO CONSIDER THE HAGUE, BRUSSELS AND STOCKHOLM, AND POSSIBLY OTHERS. (COMMENT: NO SUGGESTION WAS MADE AS TO KUWAIT; WE EXPECT NO DIFFICULTY IN SELECTING A MUTUALLY SATISFACTORY PLACE.)

(3) AS TO RULES OF PROCEDURE, HAFEZ APPEARED TO WANT THE PARTIES TO AGREE ON THE PROCEDURE, WHEREAS WE URGED THAT THIS BE GENERALLY LEFT TO THE TRIBUNAL. FINALLY, HAFEZ AGREED THAT THERE SHOULD BE A CLAUSE IN THE AGREEMENT SPECIFYING WHATEVER BASIC RULES OF PROCEDURE THE PARTIES MUTUALLY DESIRED, AND LEAVING IT TO THE TRIBUNAL TO FILL IN THE GAPS. (COMMENT: NO DIFFICULTY EXPECTED.)

NOTE BY OC/T: PASSED TO KIEFER, AMINOIL, NEW YORK.

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(4) THE AWARD MUST BE AGREED TO BE FINAL AND BINDING, WITH NO APPEAL, ANDPAYABLE PROMPTLY. (COMMENT: NO PROBLEM WHATEVER EXPECTED, PARTICULARLY SINCE HAFEZ URGED THE POINT. HE ALSO TOLD US THAT KUWAIT LAST MONTH HAD BECOME A SIGNATORY TO THE 1958 ENFORCEMENT CONVENTION.)

(5) JURISDICTION OF THE TRIBUNAL. HAFEZ SAID BOTH PARTIES SHOULD STATE THEIR CLAIMS IN THE AGREEMENT. WE SAID THIS SHOULD BE DONE LATER BEFORE THE TRIBUNAL, IN MEMORIALS OR A SEPARATE DOCUMENT. HE SAID THE PARTIES MUST STATE EXACTLY WHAT THEIR DISPUTE IS. WE SAID THE TRIBUNAL MUST BE CHARGED TO HEAR WHATEVER CLAIMS EITHER PARTY MAY HAVE AS A RESULT OF OR RELATED TO THEIR AGREEMENTS AND THE NATIONALIZATION DECREE AND ACTIONS. HE SAID A TRIBUNAL, IF IT FOUND BREACH OF CONTRACT, COULD NOT AWARD SPECIFIC PERFORMANCE, SINCE SUCH WAS IMPOSSIBLE AND IMPRACTICAL. (THE GOVERNMENT IS IN PROCESS OF SPLITTING UP AMINOIL, WITH PRODUCTION OPERATIONS GOING TO KOC, REFINING OPERATIONS AND MARKETING TO KNPC, AND ADMINISTRATION DIVIDED BETWEEN THE TWO.) WE SAID THIS MIGHT BE TRUE, BUT THAT WAS UP TO THE TRIBUNAL TO DECIDE. WHEN HAFEZ INSISTED WE MUST KNOW WHAT OUR MONETARY CLAIM WAS, WE TOLD HIM WE HAD SPENT SO MUCH OF OUR EFFORT ON THE PROCEDURAL SIDE, WE HAD NOT HAD OPPORTUNITY TO FULLY DEVELOP OUR CASE ON THE MERITS, AND MUST NOT DELAY THE ARBITRATION, SINCE WE INTENDED TO DO THIS IN PREPARATION OF OUR CLAIMS AND MEMORIALS AFTER THE TRIBUNAL WAS CONSTITUTED, ETC. (COMMENT: THIS IS THE MOST TROUBLESOME POINT RAISED, BUT WE FEEL THERE ARE SEVERAL POSSIBLE ALTERNATIVES
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WE COULD LIVE WITH WHICH MIGHT BE ACCEPTABLE TO THE GOVERNMENT, BUT WE DO NOT YET KNOW HOW TIGHTLY THE GOVERNMENT WILL HOLD TO ITS POINT ON SPECIFIC DEFINITION OF AMINOIL'S CLAIMS.)

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(6) HAFEZ PROPOSED THE AGREEMENT MUST STATE A PERIOD (HE MENTIONED ONE YEAR) FROM DATE TRIBUNAL WAS CONSTITUTED TO DATE OF AWARD. WE AGREED THAT SOME PERIOD COULD BE SPECIFIED, SUBJECT TO THE EXTENTION OF THAT PERIOD IF THE PARTIES MUTUALLY AGREED OR IF THE TRIBUNAL ORDERED.

(7) APPLICABLE LAW. WE PROPOSED THE PARTIES DESIGNATE THE APPLICABLE LAW IN THE AGREEMENT. HAFEZ LEANED TO LETTING THE TRIBUNAL DECIDE. WE SAID WE NEED TO STUDY THE MATTER FURTHER, BUT IT MIGHT BE THAT GENERAL PRINCIPLES OF LAW RECOGNIZED BY CIVILIZED NATIONS WOULD BEST SUIT THE NEEDS OF THE PARTIES FOR A FAIR ARBITRATION, AND WE INTERPRETED THE MINISTER'S STATEMENTS TO BE CONSISTENT WITH THIS; AND IF SO, THE AGREEMENT MIGHT SO PROVIDE. (COMMENT: WE SHOULD BE ABLE TO SETTLE THIS SATISFACTORILY WITHOUT ANY GREAT DIFFICULTY.)

(8) HAFEZ AGREED TO OUR SUGGESTION THAT WE SHOULD MAKE ENGLISH THE SOLE LANGUAGE OF THE ARBITRATION.

(9) WE EMPHASIZED THAT, PRIOR TO THESE MEETINGS, WE WERE NOT SURE WHAT THE GOVERNMENT HAD IN MIND; THAT WE THEREFORE COULD NOT CLEAR ANY SPECIFIC POINTS WITH OUR PRINCIPALS, BUT GENERALLY FELT THEY WOULD PROBABLY SEE THE POINTS WE HAD DISCUSSED MUCH AS WE DID. THEREFORE, WE SHOULD EXPLORE THE MATTER FURTHER TOMORROW, AND HOPED WE COULD GET SOME INDICATION THAT THE MINISTER WAS GENERALLY IN AGREEMENT WITH OUR THINKING. IF SO, WE COULD SET A MEETING TO BE HELD WITHIN THE NEXT TWO OR THREE WEEKS TO DRAFT AN ARBITRATION AGREEMTN. HE AGREED, AND SUGGESTED WE MEET IN PARIS, WHERE HE WOULD HAVE OUTSIDE COUNSEL
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AVAILABLE TO ASSIST. WE AGREED, WITH THE EXACT DATE TO BE SET LATER AFTER BOTH PARTIES COULD DETERMINE THE AVAILABILITY OF THE NECESSARY PEOPLE.

(10) HAFEZ SAID THAT AFTER WE DRAFTED THE AGREEMENT IN PARIS, HE WOULD COME BACK TO KUWAIT AND GET THE NECESARY COUNCIL OF MINISTER'S APPROVAL FOR APPROPRIATE EXECUTION, WHILE WE GOT WHATEVER APPROVALS WERE NEEDED. IN ORDER TO MAKE CLEAR THAT WE WERE NOT GIVING UP THE ARBITRATION IN LONDON UNTIL EVERYTHING WAS SIGNED, SEALED AND DELIVERED, WE TOLD HIM THAT THE AGREEMENT COULD ALSO PROVIDE THAT, UPON ITS BECOMING A DOCUMENT BINDING ON BOTH PARTIES, THE ARBITRATION SO PROVIDED WOULD BE SUBSTITUTED FOR THE ARBITRATION IN PROGRESS. THIS, INCIDENTALLY, WAS THE ONLY MENTION OF THE LONDON ARBITRATION IN THIS MEETING.

NOTE BY OC/T: PASSED TO KEIFER, AMINOIL, NEW YORK.

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(11) WE REPEATED THAT OUR GENERAL ACCORD ON THE FRAME-
WORK WAS ALL OF COURSE SUBJECT TO THE APPROVAL OF OUR PRINCIPALS,
WHO OBVIOUSLY WERE NOT YET ACQUAINTED WITH THE POINTS DISCUSSED,
JUST AS HE HAD INDICATED HE HAD TO REVIEW WITH THE MINISTER OF
OIL.

(12) HAFEZ GENERALLY AGREED THAT THE ARBITRATION AGREEMENT
SHOULD BE KEPT AS SIMPLE AS POSSIBLE, WITH DETAILS TO BE LEFT
TO THE TRIBUNAL.

FOLLOWING THESE MEETINGS, WE SAW MINISTER OF OIL AT A RECEPTION
AT THE AMERICAN EMBASSY THE EVENING OF APRIL 25. HE REITERATED
THAT HE DESIRED A "FAIR ARBITRATION."

CCC. WE MET AGAIN WITH HAFEZ AND SAMIH ON THE MORNING OF APRIL 26.
FROM FURTHER DISCUSSION OF THE POINT RE THE JURISDICTION OF THE
TRIBUNAL, WE FEEL WE MAY BE ABLE TO SETTLE THIS POINT WOUTHOUT
SPECIFICATION OF MONETARY AMOUNTS SOUGHT BY EITHER SIDE. HE
WAS APPARENTLY SATISFIED WITH THE MANNER IN WHICH WE HAD LEFT
THE OTHER POINTS, SINCE NEITHER SIDE BROUGHT THEM UP. THERE WAS
FURTHER DISCUSSION RE SETTING UP THE PARIS MEETING FOR
NEGOTIATING AND DRAFTING THE ARBITRATION AGREEMENT. HAFEZ
IS OBVIOUSLY PREPARED TO PROCEED PROMPTLY. HE SUGGESTED,
AND WE AGREED, THAT PRIOR TO THE PARIS MEETINGS, WE WOULD
FURNISH TO HIM IN KUWAIT A DRAFT OF THE ARBITRATION AGREEMENT
WE WILL PROPOSE. HAFEZ LATER TELEPHONED THE MINISTER AND REPORTED
GOOD PROGRESS, AND THAT WE WOULD FURNISH A DRAFT AGREEMENT FOR
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CONSIDERATION IN PARIS. THE MINISTER WAS APPARENTLY SATISFIED. WE ARE NOW ATTEMPTING TO SET UP A COURTESY CALL ON THE MINISTER PRIOR TO OUR DEPARTURE TOMORROW, BUT DO NOT EXPECT THERE WILL BE ANY MORE DISCUSSION OF SIGNIFICANCE.

DDD. WE ARE SATISFIED THAT THE GOVERNMENT IS SINCERE AND PREPARED TO PARTICIPATE IN AN ARBITRATION WHICH IS IN ACCORD WITH THE POINTS DISCUSSED. ALL DISCUSSIONS HAVE BEEN FRIENDLY, CORDIAL AND CONSTRUCTIVE. ALTHOUGH WE RECOGNIZE THE SITUATION CAN CHANGE, WE ARE CAUTIOUSLY OPTIMISTIC THAT WE CAN REACH A MUTUALLY SATISFACTORY AGREEMENT FOR A PROPER ARBITRATION.

EEE. IN THE MEANTIME, WE MAY FIND OURSELVES PRESSED TO DECIDE ON A DRAFT AGREEMENT WITHIN THE NEXT TWO WEEKS TO SUBMIT TO HAFEZ. WE CAN PROBABLY SAVE TIME IF DICK YOUNG COULD BEGIN A DRAFT. IN THIS CONNECTION, HAFEZ WAS INVOLVED IN THE 1965 ARBITRATION BETWEEN KUWAIT AND ORONZIO DE NORA ("DE NORA") HELD IN LAUSANNE, IN WHICH AGO WAS DE NORA'S ARBITRATOR AND SHAWCROSS KUWAIT'S ARBITRATOR; AND HE LOOKS UPON THE ARBITRATION AGREEMENT IN THAT CASE AS SOMETHING OF A MODEL. AGINST THE POSSIBILITY YOUNG DOES NOT HAVE ACCESS TO THIS, WE WILL MAIL FROM GENEVA. END TEXT

AMERICAN EMBASSY
KUWAIT, KUWAIT

FOR NEA/ARP: FOR JOHN ZIOLKOWSKI: PLEASE CONFIRM RECEIPT OF ABOVE MESSAGE WITH KEIFER, AMINOIL, NEW YORK.
MAESTRONE

NOTE BY OC/T: PASSED TO KIEFER, AMINOIL, NEW YORK.

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